Supreme Court, U.S.
FILED

No. 09-932 FEB 2- 2010

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In The
Supreme Court of the United States

MARLENE BETZ,
Petitioner,

v.

JANET NAPOLITANO,
SECRETARY, DEPARTMENT OF HOMELAND SECURITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the exceptions in 29 C.F.R. Sec. 1614.105(a)(2) to the requirement that a federal employee contact an EEO counselor within 45 days of a discriminatory act or personnel matter extend the scope of a retaliation-based constructive discharge claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. Sec. 633(a)?

2. What is the standard for retaliation-based constructive discharge claims by federal employees under the Age Discrimination in Employment Act of 1967, 29 U.S.C. Sec 633(a)?

3. When a district court bars claims and evidence of events of discrimination and retaliation before September 21, 2003 based upon 29 C.F.R. Sec. 1614.105(a)(1) and *Ledbetter v. Good Year Tire & Rubber Co.*, 550 U.S. 618 (2007), at a summary judgment hearing before trial, can the court use evidence from the barred time period to rule that no discrimination or constructive discharge occurred without a direct reversal of its earlier order?

4. Can a federal appeals court make findings of fact and rule on a retaliation-based constructive discharge claim under the ADEA that was dismissed by summary judgment when the claim is neither presented at trial nor decided with findings of fact by the district court?

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OPINIONS BELOW

The decision of the Court of Appeals is reported at 578 F. 3d 929 and is reproduced in the Appendix herein at 1a-16a. The decisions of the U.S. District Court are not officially reported but are reproduced in the Appendix at Pet. App. 21a (trial order) and 41a (summary judgment oral order).

JURISDICTION

The judgment of the Court of Appeals was issued on August 28, 2009. Pet. App. 1a. Petitioner timely petition for rehearing and rehearing en banc was denied on November 4, 2009. Pet. App. 48a. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination Act of 1967 (ADEA), 29 U.S.C. Sec. 633(a) provides:

(a) Federal agencies affected

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal regulatory Commission, in those units in the

> government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

Code of Federal Regulations

29 C.F.R. Sec. 1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she

> did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence, he or she was prevented by circumstances beyond his or her control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

STATEMENT OF THE CASE

This case concerns the ability of a federal employee to assert claims for age discrimination and retaliation for continuing retaliatory acts after bringing an EEO age discrimination complaint against her supervisor that subject her to inequitable working and pay conditions and the employer piling on duties with no hope for improvement that eventually force the employee to retire.

Marlene Betz (Betz) sued the U.S. Department of Homeland Security (DHS) for age discrimination and retaliation-based constructive discharge under the Age Discrimination in Employment Act (ADEA) arising out of her employment as an Administrative Support Assistant at the St. Paul, Minnesota office. Betz began as a GS-5 secretary for Immigration and Naturalization Services (INS) in 1995 and was upgraded to a GS-6 after a desk audit in 1997. A desk audit entailed a personnel officer examining a position to determine if the position and duties were properly classified on the pay grade scale. Betz received glowing performance appraisals from 1995 to 1999. She was again upgraded to a GS-7 after filing an EEO age discrimination complaint against her supervisor, Mark

Cangemi, the Assistant District Director of Investigations (ADDI) in 1999. Betz was 61 at the time. When Cangemi learned of her complaint he confronted her personally. After her EEO complaint, Cangemi stopped rating her altogether and Betz never received another performance appraisal or performance work plan from him despite government regulations mandating the appraisals be given annually. Cangemi attributed his failure to give Betz her performance appraisal to being busy, travel, and the events of 911, among other things. Betz requested position upgrades in 2000, 2001 and 2002.

In July of 2001, Cangemi called Betz to his office and asked what her retirement plans were. She was 63 years old. Betz was dumbfounded and responded that she planned to see if there was a buyout. Cangemi did not ask all employees about their retirement plans.

In March of 2003, St. Paul became a Special Agent in Charge (SAC) office for DHS, merging INS and the Bureau of Customs Enforcement, becoming known as Immigrations and Customs Enforcement (ICE). The St. Paul office absorbed offices in Nebraska and Iowa, along with Customs, to encompass five states under Cangemi. The number of employees grew significantly. Betz handled purchasing and accounting, monitored personnel and overtime funds, and handled payroll, in addition to other reporting and tracking duties. Betz's duties and responsibilities expanded significantly with the expansion of the office and included duties of higher level GS-11 employees, including purchasing under the Federal Financial Management System (FFMS).

Betz requested an upgrade in her job classification in Spring of 2003 with no action. In August, Betz had a performance appraisal conducted by Mary Hernandez, second in command, although Hernandez was not her direct supervisor. The appraisal was for Betz's pre-DHS job position. Betz asked Cangemi about an upgrade again in early October with no response. Cangemi made no effort to pursue a desk audit for her position. She asked again on October 29, 2003 and he said there was nothing he could do. He told her it "wasn't going to happen". Cangemi then confronted Betz alone in the break room at the end of the day and she felt threatened and unsafe. She became upset and said she had no choice but to retire. He told her she could go home and return to put in her paperwork. Betz left in tears.

Hernandez met with Betz the next day and Betz was upset and tearful. Hernandez asked Betz to stay another thirty days to help and promised her a $1,000 Special Act Award if she agreed. Betz agreed and worked the extra thirty days but the DHS never paid her the $1,000.00. Hernandez moved Betz's desk away from Cangemi's office.

Cangemi told an EEO investigator that a desk audit would not have supported an upgrade for Betz's position. He later told the investigator that he could not determine whether Betz's job should be graded at a level higher than GS-7 without a desk audit. Cangemi subsequently averred in a sworn statement that a desk audit was not initiated because management did not support the proposal for her to be upgraded. At summary judgment, the DHS argued a shortage of funding precluded an upgrade.

Other employees received job restructuring and promotions in 2003. Al Oswald, 50, performed similar duties as Betz at the Omaha office and received a promotion to a GS-9 and GS-11. Cangemi and Hernandez were upgraded. Cangemi wrote special appeal letters for others to safeguard their status. The record showed all other employees performing similar FFMS duties were grade GS-11while Betz remained GS-7. Betz, in fact, trained Sylvia Seamans, a GS-11, on FFMS. The district court found that "[t]here was no evidence provided, and the court has none showing, that anything she did was outside of her grade GS-7 classification." Pet. App. 29a. This finding was not addressed by the Circuit Court. Betz determined she could not continue to perform higher level duties for GS-7 pay with no hope of an upgrade and retired.

Betz filed an EEO complaint on November 5, 2003 and sued alleging age discrimination, constructive discharge, wage discrimination, retaliation and retaliation-based constructive discharge. The district court granted summary judgment on claims and barred evidence of events before September 21, 2003, 45 days before her EEO complaint pursuant to 29 C.F.R. Sec. 1614.105(a)(1). Pet. App. 43a. At the summary judgment hearing, held two days after this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), the district court found:

> Here, plaintiff, as I said, consulted with an EEO counselor in November 5, 2003. She was obligated by federal regulations to do so within 45 days of the alleged discriminatory act. It means she may not sit on her rights. And therefore, she may not present any evidence of

> discriminatory or retaliatory acts prior to the 45-day period before that, which means prior to September 21, 2003, as claims based on evidence - - such evidence are time-barred. Pet. App. 46a.

The Eighth Circuit concluded that this language was of minimal consequence because the district court also said "Therefore, in conclusion, the Court finds that summary judgment is appropriate and is mandated to all claims prior to that date". Pet. App. 9a. The Appeals Court noted that the court's written Order provided that "Plaintiff's claims based on allegedly discriminatory or retaliatory events that occurred prior to September 21, 2003 are untimely, and summary judgment is granted as to these claims". *Id.* The written Order, however, adopted "the reasons stated at the hearing" and barred all claims based on allegedly discriminatory or retaliatory events that occurred prior to September 21, 2003. Pet. App. 39a. This ruling was never changed.

A bench trial was held on Betz's age discrimination and constructive discharge claims and the court ruled in favor of the DHS. Pet. App. 22a. While sustaining an objection to evidence offered by Betz, the court agreed with the Government's position that the trial was based upon a constructive discharge case arising in 2003 and excluded evidence relevant to retaliation including her job duties in 1998 and performance appraisals from 1996-1999 before her EEO complaint. T-7. The district court made no findings of facts or ruling on the retaliation-based constructive discharge claims after the trial. Betz's 1999 EEO complaint was not presented in evidence at trial.

In finding no age discrimination, the district court found that Betz had been upgraded in 1997 at age 59 and in 1999 at 61. Pet. App. 66a. The court found it "significant" that Betz had not shown how she was being discriminated against at age 63 in 2003 when she hadn't been at 59 and 61. *Id.* The Appeals Court upheld the district court's conclusion that Cangemi's inquiry about Betz's retirement plans did not create an inference of age discrimination. Pet. App. 6a. The Court also rejected Betz's argument that its analysis of comparable employees was too restrictive. Pet. App. 7a.

Betz argued the district court erroneously restricted evidence to events of 2003, with limited exceptions, in conformance with its oral order at summary judgment barring evidence of events prior to September 21, 2003. The Eighth Circuit concluded that the summary judgment ruling was not an expected pre-trial ruling by the parties or referenced at trial. Pet. App. 10a. The Government's statement of the case at trial cited the district court's language that Betz "... may not present any evidence of discriminatory or retaliatory acts prior to ... September 21, 2003, ... such evidence [is] time-barred." After the trial, the district court referenced its prior order stating "This court previously ruled during the motion for summary judgment that her claim would have been limited to discriminatory conduct occurring 45 days before her EEO complaint. That would have been on or after September 21, 2003. That was the court's consideration with regard to Ledbedder (sic)". Pet. App. 24a. The Eighth Circuit concluded the district court did not exclude evidence that Betz did not offer and found no error in finding that DHS did not

discriminate against Betz because of her age. Pet. App. 10a.

Betz's contention that the district court erred utilizing evidence of events prior to 2003, while precluding her full opportunity to present evidence from the same time period, was rejected as "specious" by the Eighth Circuit. Pet. App. 9a-10a. This was premised on admission of limited evidence from pre-September 21 and the court's inquiry about Betz's duties in 1999. Pet. App.10a. The Eighth Circuit affirmed the partial summary judgment ruling that Betz's retaliation and constructive discharge claims were subject to the requirement that federal employees must generally report discrimination to an EEO counselor within 45 days of an occurrence under 29 C.F.R. Sec. 1614.105(a)(1). Pet. App. 9a. The Appeals Court rejected Betz's continuing violations theory and concluded the acts of discrimination and retaliatory adverse employment decision constituted a separate actionable 'unlawful employment practice' and concluded Betz equated denial of upgrade with a failure to promote that were discrete acts. Pet. App. 15a.

The district court ruled after trial that Betz had not been constructively discharged and this ruling was affirmed. Pet. App. 10a-11a. The Eighth Circuit adopted the Government's argument that Betz's complaints were nothing more than being "overworked and underpaid." Pet. App. 11a. The Court held that performing Betz's duties in return for her GS-7 salary (about $39,000 when she resigned) was not objectively intolerable. *Id.*

The district court conducted the trial as though Betz's retaliation-based constructive discharge claim was dismissed at summary judgment because it was premised on her 1999 EEO complaint. The court omitted ruling on the claim at trial. The Eighth Circuit noticed this omission and ruled Betz's EEO charge for her retaliation-based constructive discharge claim was timely. Pet. App. 15a. The Appeals Court, however, ruled as though the claim had been tried and found that her working conditions were not intolerable as a matter of law. Pet. App. 15a. The Court reasoned that DHS paid Betz about $39,000 annually and because she did not contend that the agency or Cangemi required her to perform duties or to work hours that were in any way "inhumane" or "unacceptable", her conditions were not intolerable. Pet. App. 16a.

REASONS FOR GRANTING THE WRIT

I. Review is Necessary to Clarify Exceptions to 29 C.F.R. Sec. 1614.105(a)(2) for Federal Employees to Prosecute Retaliation-Based Constructive Discharge Claims Under the ADEA.

This Court should recognize the exceptions in 29 C.F.R. Sec. 1614.105(a)(2) to the requirement that a federal employee contact an EEO counselor within 45 days of a discriminatory act or personnel matter and extend the scope of a retaliation-based constructive discharge claims under 29 U.S.C. Sec. 633(a), the Age Discrimination in Employment Act of 1967 (ADEA). This is an issue of first impression for this Court.

To make out a claim for retaliation, Betz had to show that she participated in a protected activity, that

DHS treated her in a manner that was materially adverse, and that there was a causal relationship between the two. Pet. App. 13a. *See Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006); *see also Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1936 (2008).

The Eighth Circuit upheld the district court's conclusion that Betz's previous EEO discrimination complaint in 1999 put her on notice of the 45-day requirement under 29 C.F.R. Sec. 1614.105(a)(1) for filing a retaliation complaint after each act of retaliation. Pet. App. 14a. Betz contended the exception to the deadline under 29 C.F.R. Sec. 1614.105(a)(2) should have extended this deadline because she was unaware that the same deadline applied to reporting acts of retaliation by Cangemi to an EEO counselor. Betz's affidavit averred that she was not aware of the 45-day notice requirement for retaliation and she received no training or information about retaliation.

This Court should recognize an exception to the requirement of reporting acts of retaliation to an EEO counselor within 45-days of the retaliation in cases of retaliation-based constructive discharge by federal employees such as Betz. The reasons for such an exception are many.

First, retaliation is not specifically enumerated in 29 C.F.R. Sec. 1614.105(a). Betz's 1999 EEO complaint focused on acts of discrimination by Cangemi and not retaliation. Indeed, the applicability of retaliation claims to federal employees under 29 U.S.C. Sec. 633(a) was not clarified until this Court's decision in *Gomez-Perez v. Potter*, 128 S.Ct. 1931 (2008). The

district court presumed its application. The Court should not create a system whereby all federal employees who pursue an EEO discrimination complaint will be strictly accountable for procedural requirements for filing all subsequent retaliation claims. The provisions of 29 C.F.R. Sec. 1614.105(a)(2) acknowledge that employees may not be aware of the 45-day reporting requirement for acts of discrimination or personnel matters. This was the situation with Betz.

In the case of a personnel action, the requirement is to contact the EEO counselor within 45-days of the *effective date* of the action. 29 C.F.R. Sec. 1614.105(a)(1)(emphasis added). In a retaliation-based constructive discharge, the 45-days can easily pass before the employee has any sense that inaction is retaliatory. For example, in Betz's case, Cangemi was required by government regulation to annually conduct her performance appraisal and review her position to ensure it accurately described her duties and responsibilities. When it was not done, she inquired. She received a variety of excuses from Cangemi for not conducting her performance appraisal, performance work plans and responding to requests for desk audits and upgrades. Sometimes she received no response. The pattern of inaction and non-responsiveness by Cangemi to Betz's requests to undertake standard personnel practices for her position occurred without an "effective date" of action but continued over a period of time. He did not make contact with personnel employees about initiating desk audits or upgrades. There were no specific personnel actions taken, such as a demotion or direct denial of an upgrade or desk audit, from which to demarcate discrete acts. Many times there was simply no

response by Cangemi to Betz's requests for her performance appraisal, a desk audit of her position, or an upgrade of her position and pay scale. Her duties, meanwhile, increased in volume and complexity.

This differed from the scenario posed by the district court, citing *Ledbetter* for the proposition that people know when they don't get paid. Pet. App. 46a. The Eighth Circuit, in turn, characterized all of the pre-September 21 matters that prevented her from obtaining additional compensation as "discrete acts that required her to contact an EEO counselor within 45 days of their occurrence" analogizing them to acts such as termination, failure to promote, denial of transfer, and refusal to hire discussed in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Pet. App. 15a. Cangemi's retaliatory actions and inactions were not "personnel actions" with "effective dates" as contemplated in 29 C.F.R. Sec. 1614.105(a)(2) and the exception to the 45-day requirement for contacting an EEO counselor should apply. The Court made no distinction between events pertaining to retaliation and retaliation-based constructive discharge in affirming the district court's barring pre-September 21 matters. Pet. App. 15a.

The lower Courts' rulings rewarded DHS for Cangemi's actions in delaying any response or giving no response to Betz's requests that simply let the 45 days for filing an EEO charge run out. This scenario differs significantly from an employee seeking a specific promotion, or being transferred or demoted, where the personnel action is not contingent on the occurrence of other events. The Courts below rejected Betz's equitable tolling and continuing violations arguments. Pet. App. 15a, 45a.

Circuit courts addressing constructive discharge require employees to try to work out any differences or address the circumstances creating the intolerable conditions before resigning. *See e.g., West v. Marion Merrell Dow, Inc.*, 54 F. 3d 493, 498 (8th Cir. 1995)("An employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged"); *Jones v. Fitzgerald*, 285 F. 3d 705, 715-16 (8th Cir. 2002)("A plaintiff must take affirmative steps short of resigning that a reasonable employee would take to make her conditions of employment more tolerable"); *Clowes v. Allegheny Valley Hospital*, 991 F. 2d 1159, 1161 (3d Cir. 1993); *Nance v. Goodyear Tire & Rubber Co.*, 527 F. 3d 539, 554-55 (6th Cir. 2008); *Wolf v. Northwest Indiana Symphony Society*, 250 F. 3d 1136, 1143 (7th Cir. 2001); *Woodward v. City of Worland*, 977 F. 3d 1392, 1402 (10th Cir. 1992); *Garner v. Wal-Mart Stores, Inc.*, 807 F. 2d 1536, 1539 (11th Cir. 1987). Strict application of 29 C.F.R. Sec. 1614.105(a)(1) to retaliation-based constructive discharge claims acts to eviscerate such claims for federal employees.

This Court observed in the Title VII context that the anti-retaliation provision protects an individual not from all retaliation but from retaliation that produces an injury or harm. *Burlington Northern v. White*, 548 U.S. at 67. Retaliation-based constructive discharge claims are distinct from discrimination claims under 29 C.F.R. Sec. 1614.105(a)(1). In *Burlington Northern* this Court held that a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context, means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Burlington Northern*, 548 U.S. at 68.

Employees unable to determine within 45-days if they are the victim of retaliation as compared to discrimination or harassment will lose the claim under the Eighth Circuit's holding. Shrewd supervisors like Cangemi, a lawyer, can wait 45 days before retaliating by contriving reasons for not conducting performance reviews and performance work plans, which would have given her opportunity for additional compensation, refusing to respond to requests for desk audits, refusing to give her opportunity for upgrades that would have increased her salary, and piling on additional job duties including those of higher grade employees without additional compensation, or otherwise retaliating.

The ADEA's substantive provision and its anti-retaliation provision are not coterminous. *See e.g., Burlington Northern*, 548 U.S. at 67. The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. 548 U.S. at 63. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct. *Id*. The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. 548 U.S. at 67. A plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination'". 548 U.S. at 68 (citations omitted).

Betz's retaliation-based constructive discharge was the cumulative total of retaliatory events by Cangemi that extended well past the 45-day limits set by the lower courts. Federal employees like Betz may not be able to determine if they've been retaliated against

within 45 days. Limiting the scope of retaliation-based constructive discharge claims to within 45 days of the occurrence of the underlying events will effectively emasculate federal employees from such claims. Betz should have been permitted to proceed with an extended scope of claim as allowed by 29 C.F.R. Sec. 1614.105(a)(2). A decision by this Court is needed to clarify the scope of retaliation-based constructive discharge claims and exceptions in 29 C.F.R. Sec. 1614.105(a)(2) for federal employees under the ADEA.

II. Review Should be Granted to Address the Standard for a Retaliation-Based Constructive Discharge Claim by a Federal Employee Under the ADEA, 29 U.S.C. Sec. 633(a).

The Eighth Circuit strayed drastically from the standard for constructive discharge established by this Court and other circuit courts. The Appeals Court held that Betz's working conditions were not intolerable as a matter of law. Pet. App. 15a. While seemingly applying the proper standard, the Court held that "As we have said, DHS paid Ms. Betz about $39,000 annually, and she did not contend that the agency or Mr. Cangemi required her to perform duties or to work hours that were in any way inhumane or unacceptable". Pet. App. 16a. The Eighth Circuit unilaterally created a higher burden of proof for retaliation-based constructive discharge claims for federal employees by requiring proof of conditions that are inhumane or unacceptable.

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004), this Court held in a Title VII sexual harassment case in order to establish constructive

discharge, the plaintiff must also show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. Federal circuit courts have adopted a reasonable person standard in constructive discharge cases to assess whether the employee's resignation was proper under the circumstances. *See e.g., Tatom v. Georgia-Pacific Corp.*, 228 F. 3d 926, 932 (8th Cir. 2000); *Feliciano-Hill v. Principi*, 439 F.3d 18, 27 (1st Cir. 2006); *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000); *Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 167 (3d Cir. 2001); *Heiko v. Colombo Sav. Bank*, 434 F.3d 249, 262 (4th Cir. 2006); *Haley v. Alliance Compressor LLC*, 391 F.3d 644, 649-50 (5th Cir. 2004); *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 635 (6th Cir. 2003); *Williams v. Waste Management of Illinois*, 361 F.3d 1021, 1032 (7th Cir. 2004); *Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007); *Potts v. Davis County*, 551 F.3d 1188, 1194 (10th Cir. 2009); *Bryant v. Jones*, 575 F.3d 1281, 1298 (11th Cir. 2009); *Veitch v. England*, 471 F.3d 124, 130 (D.C. Cir. 2006).

Requiring federal employees like Betz to show conditions were "inhumane" created a new standard for retaliation-based constructive discharge not followed in other circuit courts. "Inhumane" has been equated with severe abuse more extreme than an individual being beaten unconscious and sustaining scars and a physical deformity. *See e.g., Reyes-Morales v. Ashcroft*, 435 F. 3d 937, 942 (8th Cir. 2006)(Asylum case). Federal employees should not be required to show they have been tortured or kept in inhumane conditions to prove constructive discharge. This wrongfully elevates constructive discharge to unconscionable persecution and is not the correct legal standard. *See Premratananont v. South Suburban*

Park & Recreation District, No. 97-1090, 1998 WL 211543, at *2 (10th Cir. *April* 30, 1998)(*citing Woodward v. City of Worland*, 977 F. 2d 1392, 1402 (10th Cir. 1992))(Constructive discharge claims may also be based on other types of intolerable working conditions such as retaliatory conduct for making a complaint of discrimination). This Court should review the standard for what is needed to show intolerable conditions for a reasonable employee for a retaliation-based constructive discharge articulated by the Eighth Circuit.

The Eighth Circuit analyzed Betz's retaliation-based constructive discharge claim by requiring direct evidence (e.g., inhumane treatment) to create intolerable working conditions. This herculean standard will most likely never be met in a retaliation-based constructive discharge claim by federal employees. If inhumane conditions did exist, this standard would require the conditions to continue after the employee gave the Government a chance to work out the problem in order to maintain a claim. Direct evidence alone, however, is unnecessary for constructive discharge based on cumulative acts of retaliation. Instead, retaliation by delaying performance appraisals and performance work plans, delaying and ignoring responses to the employee's inquiries about them, delaying and refusing to respond to inquiries for desk audits and upgrades, piling on additional job duties without hope of increased compensation or grade increase, and other acts by a supervisor that lead to working conditions becoming intolerable will accumulate in over 45 days to become a constructive discharge and should be fully actionable under the ADEA.

Betz presented evidence that her pay was unacceptable for her duties. She performed higher grade level duties than her own for several years. Her requests for performance appraisals, upgrades and desk audits were ignored or given flimsy excuses. The DHS' failure to follow mandatory regulations covering these areas for Betz was not mentioned by the Court. Cangemi, the SAC, went to the break room the afternoon on October 29, 2003, to confront her face to face. She felt threatened. Standing two feet away, he told her that her request for an upgrade "wasn't going to happen". She realized she would not be upgraded like other employees under any circumstance and resigned.

The Eighth Circuit adopted the Government's mantra that Betz's intolerable working conditions essentially amounted to her complaining of being "overworked and underpaid". Pet. App. 11a. The Court found no clear error and that the district court was not required to find that her performing her duties at GS-7 pay was not objectively intolerable. Betz had the same GS-7 grade since 1999 despite the office and her duties growing from three states to five plus Customs in 2003. She performed FFMS duties performed by GS-11 employees and trained Sylvia Seamans on FFMS. The lower courts noted there was no evidence of Seamans' age. Pet. App. 8a. Proof that Seamans was younger than Betz, however, was unnecessary to show Betz's different treatment because of age. *See e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)(employee permitted to prove an adverse employment action because of sex without evidence that employees of the opposite sex were treated differently). Betz was the only employee in her position in the St. Paul office. Comparison to higher grade

employees performing similar duties in the office was relevant to show disparate treatment. Comparison to Oswald in the Omaha office performing nearly identical duties was likewise probative of discrimination. As is *Oncale*, Betz need only show she was discriminated and retaliated against because of her age and EEO activity. No evidence of other employees performing higher grade level duties than their pay was introduced. There was no testimony by others who felt they were "overworked and underpaid".

Requiring federal employees to prove inhumane treatment to show retaliation based constructive discharge, or constructive discharge in general, allows employers to pile on higher grade level duties to older employees who complain about discrimination and not allow them to be fairly paid, or be evaluated, the same as others. The requirement of inhumane treatment creates a herculean burden that transforms retaliation-based constructive discharge claims into claims of near brutality in order to prevail. Federal employees should not have to face inhumane treatment before resigning. This burden does little to advance a safe, professional, and tolerable work environment for federal employees. The law must preserve the safety and civility of the workplace for federal employees who complain about retaliation by the employer and this Court should review the issue in the context of retaliation-based constructive discharge.

III. Review is Necessary to Establish Procedural Fairness for Enforcing Pre-Trial Rulings By the District Court Barring Evidence of Events Before the 45-day Filing Period Under 29 C.F.R. Sec. 1614.104(a)(1) Before September 21, 2003, But Using Events From the Barred Period to Find No Age Discrimination While Excluding Evidence From the Same Period.

The Eighth Circuit affirmed the district court's finding that DHS did not discriminate against Betz because of her age. Pet. App. 10a. In finding no age discrimination, the district court found that Betz had been upgraded in 1997 at age 59 and in 1999 at 61. Pet. App. 28a. Oddly, the court cited Fed. R. Civ. P. 50 in granting judgment for the DHS. Pet. App. 24a. The court found it "significant" that Betz had not shown how she was being discriminated against at age 63 in 2003 when she hadn't been at 59 and 61. *Id.* The court, however, unfairly excluded events from before 2003 while using events from the same period against Betz. The Eighth Circuit found specious Betz's contention that the court's remark about evidence in the midst of the summary judgment hearing affected the court's rulings and decision at trial. Pet. App.9a-10a. This was premised on admission of limited evidence from pre-September 21 and the court's limited inquiry about Betz's duties in 1999. Pet. App. 10a.

The district court's ruling that Betz could not offer evidence of discriminatory or retaliatory acts prior to the 45-day period before September 21, 2003 was not reversed at any time by the district court. *See* Pet. App. 46a. Once the court makes a definitive ruling on

the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. *See* Fed. R. Evid. 103(a)(2). Betz was not required to continue to offer evidence from the prohibited period that was barred by the court's previous ruling. Indeed, when she attempted to offer such evidence, it was largely excluded as irrelevant by the district court.

The summary judgment ruling excluding evidence of discriminatory and retaliatory events before September 21, 2003 remained in place and was acknowledged at trial. Pet. App. 24a. The court did not rule on motions in limine filed by the parties. The district court recognized the summary judgment ruling and cited to *Ledbetter* in its trial ruling. *Id.* The prejudicial exclusion of evidence of events of discrimination and retaliation by the ruling was compounded by the exclusion of relevant evidence Betz offered at trial. The Eighth Circuit did not address Betz's arguments that the district court excluded relevant evidence. Instead, the Court characterized the summary judgment ruling as an "alleged evidentiary ruling" and concluded that the district court "did not exclude evidence that Ms. Betz did not offer" and therefore could not have erred. Pet. App. 10a

At trial, the district court sustained the Government's objections and excluded evidence of events before 2003 offered by Betz, including:

1) Betz's job performance appraisals from 1996 through 1999. Excluding this evidence foreclosed opportunity for follow up and was relevant to Cangemi's discriminatory and retaliatory motive after her EEO charge in 1999

and comparison to his failure to appraise her thereafter.

2) Requests for upgrades in her position before 2003 was excluded. The court deemed this evidence irrelevant. This precluded inquiring why Cangemi failed to seek upgrades from Betz after her EEO Charge in 1999 as well as conduct performance appraisals and performance work plans. This was relevant to Betz's claims and working conditions after her upgrade requests. Her upgrades in 1997 and 1999 were cited by the court as evidence she was not discriminated against in 2003. The ruling precluded inquiry into her upgrade in 1999 as it related to her EEO charge. It precluded other questions relating to Cangemi's reasons for not pursuing upgrades for Betz before 2003.

3) Al Oswald's performance appraisal stating the reasons for his promotion to GS-9 on May 18, 2003 was because of his "superior performance and qualifications" was excluded as irrelevant. Oswald was a 50-year old Betz used as a comparator. Oswald received a pay increase and promotion when the Government contended there was no money for upgrades.

4) Exhibit 105 relating to Betz's job in 1998 was excluded as irrelevant to the events leading to the constructive discharge in 2003.

The exclusion of this evidence, while referring to Betz's upgrades in 1997 and 1999 at 59 and 61 to show she was not discriminated against, was extremely

prejudicial. Betz was unable to present evidence to rebut these findings. Betz was not responsible for the court's general questions about her duties in 1999 that had little to do with discriminatory animus. The court's rulings set the parameters for evidence for events in 2003. The court allowed background evidence of Cangemi's inquiry of Betz about her retirement plans in 2001 that were dismissed as "medium conjunct". Pet. App. 31a. This Court should recognize that a district court abuses its discretion when its evidentiary rulings are made arbitrarily in light of its pretrial ruling barring evidence to deny a plaintiff fair opportunity to present evidence of discrimination. *See White v. Honeywell, Inc.*, 141 F. 3d 1270, 1274 (8th Cir. 1998); *Hindman v. Transkrit Corporation*, 145 F. 3d 986, 993, fn. 26 (8th Cir. 1998)("A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries"), citing *Estes v. Dick Smith Ford, Inc.*, 856 F. 2d 1097, 1103 (8th Cir. 1988). Review is necessary to recognize the abuse of discretion standard for federal district courts when evidentiary rulings are arbitrarily applied to deny plaintiffs fair opportunity to present evidence of discrimination in ADEA trials.

IV. Review Should Be Granted When the Court of Appeals Makes Findings of Fact on a Federal Employee's Retaliation-Based Constructive Discharge Claim That Has Been Previously Dismissed by Summary Judgment And Was Not Tried Before The District Court.

The Eighth Circuit noted that "... Betz's EEO charge was timely as to her retaliation-based constructive discharge claim, which the court does not seem to have addressed separately, but we conclude that her working conditions were not intolerable as a matter of law." Pet. App. 15a. The Court observed "Although an employee would certainly not want to work for a supervisor who retaliated against her for a now-moot discrimination charge filed four years ago, we do not believe those circumstances would make the job intolerable. As we have said, DHS paid Ms. Betz about $39,000 annually, and she did not contend that the agency or Mr. Cangemi required her to perform duties or to work hours that were in any way inhumane or intolerable." Pet. App. 16.

At the onset, the Court of Appeals wrongly presumed that the trial covered Betz's retaliation-based constructive discharge claim and the district court overlooked it. Pet. App. 15a. There was admittedly no evidence of Betz's 1999 EEO charge at the trial that, for the most part, was restricted to events in 2003. Betz's 1999 EEO complaint was addressed in the DHS' summary judgment motion and the district court's ruling. Pet. App. 45a ("Therefore, to the extent the alleged wage discrimination and constructive discharge maybe considered retaliation, plaintiff's conduct prior to September 21, 2003, this

Court considers the claims to be time-barred"). The claim was not addressed by the district court with findings of fact in the post-trial order. Pet. App. 22a-36a.

While Betz's 1999 EEO charge was part of the record at summary judgment, the panel's decision improperly portrayed it as though it was presented at trial. The Appeals Court did not rule on the summary judgment of Betz's retaliation-based constructive discharge claims. Significantly, the district court did not make findings of fact or conclusions of law about the claim after trial. Pet. App. 22a-36a. The Court's characterization and ruling regarding Betz's retaliation-based constructive discharge claim is not supported by the trial record.

The standard governing appellate review of a district court's finding in discrimination cases is clearly erroneous as articulated in Federal Rule of Civil Procedure 52(a). *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573,105 S.Ct. 1504, 1511, 84 L.Ed. 2d 518 (1985). This standard does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. *Id.* The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. *Id.* "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*". *Anderson*, 470 U.S. at 573,105 S. Ct. at 1511, citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S. Ct. 1562, 1576, 23 L.Ed. 2d 129 (1969).

In a bench trial, the district court is required to find the facts specifically and state separately its conclusions of law. *King v. United States*, 553 F. 3d 1156, 1161 (8th Cir. 2009). The court must provide sufficient findings of fact to enable the appeals court to review its decision. *Id.* The appeals court may not make these findings of fact or exercise discretion in the district court's stead. *Id.* Other federal courts of appeals have reiterated the principle that an appellate court should not make findings of fact in the district court's stead. *See, e.g., Atlantic Thermoplastics Co., Inc. v. Faytex Corp.*, 5 F.3d 1477, 1479 (Fed. Cir. 1993) ("Rule 52(a) makes clear the separate and distinct roles of the trial and the appellate court. This court must review factual findings made by the district court; it may not guess at findings left unmade. Fact-finding by the appellate court is simply not permitted"); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 277 (5th Cir. 2008) ("The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court") (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)).

The absence of a trial ruling on the retaliation-based constructive discharge claim was not merely an oversight, but the result of the district court's dismissal of the claim by its summary judgment ruling barring all claims and acts pre-September 21, 2003. Under the district court's ruling, there could be no retaliation for events outside of the claim period of September 21 to November 5, 2003. Betz's 1999 EEO complaint was considered too remote by the district court to fall within the claims period and dismissed the claim at summary judgment. Pet. App. 45a. The absence of any mention of the retaliation claim in

closing argument or a ruling on the claim after trial underscored this point.

Because the Eighth Circuit improperly made findings of fact on Betz's retaliation-based constructive discharge claim when the district court did not make findings of fact on the claim that it dismissed at summary judgment, while finding that Betz's EEO charge for the claim was timely filed, the claim should be remanded to the district court for trial on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: February 2, 2010

Respectfully submitted,

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APPENDIX

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-3027

[Filed August 28, 2009]

Marlene Betz,	)
	)
Appellant,	)
	)
v.	)
	)
Michael Chertoff, Secretary, Department of Homeland Security,	)
	)
Appellee.	)

Appeal from the United States
District Court for the
District of Minnesota.

Submitted: June 11, 2009
Filed: August 28, 2009

Before SMITH, ARNOLD, and SHEPHERD, Circuit Judges.

ARNOLD, Circuit Judge.

After leaving her job with the Department of Homeland Security, Marlene Betz brought an action against DHS under the Age Discrimination in Employment Act (ADEA). *See* 29 U.S.C.A. § 633a. She claimed that Mark Cangemi, her supervisor throughout her employment, denied her upgrades and related salary increases on several occasions and eventually constructively discharged her because of her age and in retaliation for her having filed an EEO charge alleging age discrimination. The district court[1] granted, in part, DHS's summary judgment motion for failure to comply with administrative deadlines. The court then held a bench trial on Ms. Betz's claim that she was constructively discharged because of her age and entered judgment for DHS on that claim. Ms. Betz appeals and we affirm.

In 1995, Ms. Betz began working in the St. Paul office of the Immigration and Naturalization Service as a secretary at the GS-5 pay-grade level. Her supervisor, Mr. Cangemi, was the assistant district director for investigations. In 1997, INS upgraded Ms. Betz from a GS-5 to a GS-6 after having conducted what is called a desk audit of her job. (The government may upgrade an employee's position without requiring the employee to compete for a different job by conducting a desk audit, in which the government reviews the tasks that the employee is performing to determine whether she is properly classified.) Ms. Betz requested a desk audit in 1998, and as a result was

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[1] The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota.

upgraded the next year to a GS-7. But before that upgrade, in August, 1999, Ms. Betz had filed an EEO complaint asserting that she had not received the requested desk audit because of her age; unbeknownst to her, Mr. Cangemi had already approved her desk audit request. After 1999, Mr. Cangemi ceased giving Ms. Betz annual performance appraisals, did not revise her job description, and denied her later requests for an increase in her GS-7 pay-grade level (though she received scheduled step increases within that level). Ms. Betz resigned in November, 2003, shortly after Mr. Cangemi refused her last upgrade request.

In early 2003, when the Department of Homeland Security was created, the Bureau of Customs Enforcement and INS merged to form Immigrations and Customs Enforcement (ICE), a division of DHS. The INS St. Paul office, where Ms. Betz worked, had been responsible for immigration investigations in three states. When DHS was formed, that office acquired responsibility for two additional states and Customs matters and became a so-called Special-Agent-in-Charge (SAC) Office of ICE, with Mr. Cangemi as the acting SAC. Ms. Betz remained the only administrator-secretary in the office, and the volume and complexity of her workload increased. According to Ms. Betz, her new duties included those that GS-11 employees performed and thus she should have been upgraded from GS-7 to GS-11.

Ms. Betz asked Mr. Cangemi for an upgrade in the spring of 2003 and he said that he would check into it. When he did not mention it again, she again asked him on October 1; she mentioned her additional duties and told Mr. Cangemi that if she did not get an

upgrade she would be forced to retire. He responded that there was nothing that he could do. She brought up the topic for the last time on the morning of 29 October. Mr. Cangemi testified at trial that he told her "categorically ... that it was not going to happen." Ms. Betz testified, in turn, that she felt that given her workload and "not seeing any opportunity of being advanced in grade or being compensated for that it didn't leave a whole lot of opening for me to do. ... it was either continue working at the grade I was being paid, doing the level of work I was doing, or retiring. And I just felt I had no options." She told Mr. Cangemi at that time that she was going to retire. She was sixty-five years old.

That afternoon, Mr. Cangemi came into the break room while Ms. Betz was there. She testified that he told her that there was nothing that he could do about her "demands" for an upgrade, and that if she was upset, she should go home and return when she completed her paperwork for retirement. She testified that she felt intimidated by his presence. At trial, Mr. Cangemi testified that Ms. Betz seemed upset when he saw her in the break room and that he told her that she could go home, but he denied mentioning her completing any paperwork.

Ms. Betz filed this action, contending that because of her age and in retaliation for her 1999 EEO complaint, Mr. Cangemi failed to upgrade her so that she would be paid commensurate with her duties and that his failure to do so resulted in her constructive discharge.

I.

Ms. Betz argues that the district court erred in several ways in entering judgment for DHS following a bench trial on her claim that she was constructively discharged because of her age. We review the district court's factual findings, including the ultimate determination of whether discrimination occurred, for clear error, and its legal conclusions *de novo*. *See* Fed. R. Civ. P. 52(a); *Littleton v. Pilot Travel Centers, LLC*, 568 F.3d 641, 647 (8th Cir. 2009); *Tadlock v. Powell*, 291 F.3d 541, 546 (8th Cir. 2002). Rule 52(a)(6) directs us to "give due regard to the trial court's opportunity to judge the witnesses' credibility." At the close of the evidence, the district court (citing Fed. R. Civ. P. 50, which governs judgment as a matter of law in a jury trial) concluded that Ms. Betz did not make out a case of constructive discharge, but it also made factual findings in support of its judgment for DHS. We review the court's findings for clear error and need not determine whether the evidence could have supported a judgment in favor of Ms. Betz.

A.

In her brief, Ms. Betz first contends that the district court erred in finding that she was not discriminated against on account of her age. She begins by referring to evidence that she says shows that Mr. Cangemi gave false reasons for denying her an upgrade, and that a factfinder could infer from their falsity that the given reasons were a pretext for age discrimination. *See Loeb v. Best Buy Co.*, 537 F.3d 867, 873 (8th Cir. 2008). We agree that an employer's false explanation may support – though it does not require – an inference of discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-47 (2000). But the question of what inferences the

evidence could have supported is at best tangential to our limited standard of review, which requires us to accept the district court's finding that Mr. Cangemi did not discriminate against Ms. Betz on account of her age unless, after having reviewed the evidence, we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Littleton*, 568 F.3d at 647; *see* Fed. R. Civ. P. 52(a). We are not convinced that the district court made a mistake in failing to infer an impermissible discriminatory animus on Mr. Cangemi's part from this evidence.

Ms. Betz also relies on a conversation that she had with Mr. Cangemi as evidence that he discriminated against her because of her age. In July, 2001, Mr. Cangemi asked Ms. Betz about her retirement plans shortly after a co-worker about her age had retired. She testified that the inquiry upset her and said that she was going to see if a buyout was available. Mr. Cangemi did not bring up the topic again. The court found that "[i]n the world, people ask each other what their plans are for the future," and that Mr. Cangemi's "simple inquiry ... was not an indication of discrimination based on age." The court added that although age "cannot be permitted to be the determining factor, [i]n this case, there is no indication that this was a determining factor of anything." We have held that "[r]easonable inquiries into an employee's retirement plans do not permit an inference of age discrimination," *Lewis v. St. Cloud Univ.*, 467 F.3d 1133, 1137 (8th Cir. 2006) (internal quotation marks and citation omitted), and thus the court's failure to infer bias from Mr. Cangemi's question cannot be clear error.

Ms. Betz based her age discrimination claim, in part, on her assertion that similarly situated younger employees were classified as GS-11, as compared to her GS-7 grade. To prove discrimination by comparing herself to others, Ms. Betz had to show that the other employees were younger than she and were similarly situated "in all relevant respects." *See Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691-92 (8th Cir.2002). We will overturn the district court's finding that the employees were not similarly situated only if it is clearly erroneous. *See Hayes v. Invesco, Inc.*, 907 F.2d 853, 856 (8th Cir. 1990). To be similarly situated two employees ordinarily must deal with the same supervisor or the decision-maker must be the same in both instances. *See Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034, 1043 (8th Cir. 2007). Ms. Betz maintains that the district court's approach to determining whether an employee was comparable to her "was too restrictive under the circumstances."

Here the district court found, based on evidence in the record, that Mr. Cangemi had no authority over the allegedly similarly situated employees when their GS-11 status was authorized. Al Oswald, one of the employees whom Ms. Betz compared herself to, worked in the Omaha, Nebraska, INS office. He was younger than Ms. Betz when his supervisor chose him for a GS-11 position. There was evidence that Mr. Cangemi had nothing to do with that decision, and his office did not even have authority over the Nebraska office at the time. Ms. Betz argues that Mr. Oswald is nonetheless similarly situated because by the time he began working in the GS-11 position in Omaha, DHS had been formed and Mr. Cangemi was in charge of a district that included Nebraska. But the relevant decision had already been made, and Ms. Betz has

presented no evidence to show that Mr. Cangemi was involved in, or even aware of, Mr. Oswald beginning his GS-11 duties. We see nothing that would compel the district court to deem him similarly situated to Ms. Betz.

Ms. Betz also contended that her salary grade should have been compared to that of Barbara [sic] Seamans in the St. Paul office, whose pay-grade level was GS-11. The district court stated that it did not know Ms. Seamans's age and Ms. Betz has not indicated where we might find that information in the record. Nor have we seen it. The district court found, moreover, that Ms. Seamans was upgraded to GS-11 status before Mr. Cangemi had any authority over her, and Ms. Betz has offered us no evidence to the contrary. We see no basis for determining that the district court clearly erred in finding that Mr. Oswald and Ms. Seamans were not similarly situated in all relevant respects to Ms. Betz.

We believe that Ms. Betz's evidence of age discrimination was, at best, weak, and we thus cannot conclude that the district court clearly erred by finding that none existed.

Ms. Betz argues in the alternative that the district court erroneously excluded evidence and thereby prevented her from showing that Mr. Cangemi discriminated against her based on her age. But Ms. Betz did not offer into evidence many of the documents that she now contends were wrongly excluded. She maintains that we may nevertheless address the court's "exclusion" of these items because she was precluded from presenting them based on a statement

that the court made during a hearing on DHS's summary judgment motion. We disagree.

As we have said, the district court granted partial summary judgment to DHS based on Ms. Betz's failure timely to seek administrative remedies. Federal employees generally must report discrimination to an EEO counselor within 45 days of an occurrence. 29 CFR § 1614.105(a)(1). Because Ms. Betz did not contact an EEO counselor about any of her claims in this case until November 5, 2003, the court concluded that she could not proceed with any claims based on occurrences before September 21, 2003, which is 45 days before November 5. When ruling on the summary judgment motion at the close of the hearing, the court said that Ms. Betz "may not present any evidence of discriminatory or retaliatory acts prior to the 45-day period," and Ms. Betz relies on these words to excuse her failure to offer such evidence at trial. But in the same sentence the court explained that "claims based on evidence – such evidence are time barred," and then summarized its ruling: "Therefore, in conclusion, the Court finds that summary judgment is appropriate and is mandated to all claims prior to that date." The court's written order followed. It provided that "Plaintiff's claims based on allegedly discriminatory or retaliatory events that occurred prior to September 21, 2003 are untimely, and summary judgment for defendant is granted as to these claims" and made no reference to evidentiary rulings.

Particularly given the context, we find specious Ms. Betz's contention that the court's remark about evidence in the midst of the summary judgment hearing excused her from offering evidence at trial that she now says the court wrongly "excluded." (We

reject as well her related assertion that the court's purported prohibition on pre-September 21 evidence was "particularly egregious" because the court relied on events during that time period in its decision.) Summary judgment hearings, of course, are not ordinarily used to make pre-trial evidentiary rulings, and we have seen nothing in the record to indicate that either party requested or expected the court to make such rulings. And Ms. Betz made no reference at trial to the alleged evidentiary ruling. Instead, her conduct during the trial was inconsistent with her present assertion that the court had prohibited her from presenting evidence of pre-September 21 occurrences: She offered and the district court admitted evidence of some matters that occurred during that time period, and the court itself asked her what duties she had performed in 1999. Because the district court simply did not exclude evidence that Ms. Betz did not offer, the court plainly could not have erred. In addition, the material that Ms. Betz contends was wrongly excluded contains little or no evidence that is even related to the question of discriminatory animus.

We therefore conclude that the district court did not err in finding that DHS did not discriminate against Ms. Betz because of her age.

B.

Even if the court had erred in finding that DHS did not engage in age discrimination, Ms. Betz would not have been entitled to relief because she has not established that the court erred in finding that she was not constructively discharged. To make out a case of constructive discharge, Ms. Betz had to show that a reasonable person would have found her working conditions intolerable, and that Mr. Cangemi intended

to make her resign or, at a minimum, that her resignation was reasonably foreseeable given the conditions under which she was working. *Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906, 910 (8th Cir. 2003).

"The intolerability of working conditions is judged by an objective standard," and to prevail on a constructive discharge claim, a plaintiff must show that his or her "working conditions were rendered so objectionable that a reasonable person would have deemed resignation the only plausible alternative." *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 932 (8th Cir. 2000). To prevail on appeal, Ms. Betz must show that the district court clearly erred in finding that her working conditions were not intolerable. *Cf. Tadlock v. Powell*, 291 F.3d 541, 547 (8th Cir. 2002).

As the DHS observes, Ms. Betz essentially argues that her employment conditions were intolerable because she was overworked and underpaid. Although we can envision circumstances in which an employee must do so much work for so little compensation that the working conditions become intolerable, especially when the conditions are imposed for discriminatory reasons, we do not think that the court clearly erred in finding that Ms. Betz's conditions were not intolerable. We do not believe that the district court was required to find that performing Ms. Betz's duties in return for her GS-7 salary (about $39,000 annually when she resigned) was objectively intolerable.

Not surprisingly, none of the constructive-discharge cases that Ms. Betz cites in her brief is based on inadequate compensation: The plaintiff in *Wright v. Rolette County*, 417 F.3d 879, 886-87 (8th Cir. 2005),

cert. denied, 546 U.S. 1173 (2006), claimed that she was forced to quit because of a hostile work environment, a frequent basis for constructive discharge claims, *see, e.g., Nichols v. American Nat'l Ins. Co.*, 154 F.3d 875 (8th Cir. 1998); *Delph v. Dr. Pepper Bottling Co.*, 130 F.3d 349 (8th Cir 1997). (We concluded in *Wright*, 417 F.3d at 886, that the supervisor's conduct, though "serious and reprehensible," did not as a matter of law create an intolerable work environment.) Ms. Betz cites two other constructive discharge cases, both brought under the ADEA. In the first, we reversed a judgment for the plaintiff because the record evidence could not support a finding that the plaintiff's working conditions were intolerable. *Tatom*, 228 F.3d at 931-32. The plaintiff had quit rather than accept a 120-day suspension for a safety violation. *Id.* at 930-31. As we observed in *Tatom*, *id.* at 932, we have previously held that "such things as loss of supervisory responsibilities, a feeling of being unfairly criticized, dissatisfaction with work assignments, and loss of pay are insufficient to constitute a constructive discharge."

Although we upheld a verdict for the plaintiff in *Smith v. World Ins. Co.*, 38 F.3d 1456, 1461-62 (8th Cir. 1994), the final case that Ms. Betz cites, that case presented circumstances far different from those before us. We stated in *Smith*, *id.* at 1461, that "an offer of early retirement constitutes a constructive discharge when the choice is [between] early retirement or continuing to work under intolerable conditions, like the threat of termination without benefits," and held that the plaintiff's evidence satisfied this standard. The plaintiff testified that his employer "threatened to 'turn the screws' and 'build a file' against [him] if he did not resign" and made clear

that he would not get benefits unless he took early retirement. *Id.* In addition, the individual who convinced the plaintiff to resign had admitted to another witness that he wanted to "get rid of" older employees, including the plaintiff. *Id.* at 1462.

The cases that Ms. Betz relies on are of no assistance to her, and we conclude that the district court did not clearly err in finding that her working conditions were not objectively intolerable.

II.

In her final point, Ms. Betz contends that the district court erred in concluding that her retaliation claims based on retaliatory events before September 21, 2003, were barred because her EEO charge was untimely. We disagree.

To make out a claim of retaliation, Ms. Betz had to show that she participated in a protected activity, that DHS treated her in a manner that was materially adverse, and that there was a causal relationship between the two. *See Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006); *Littleton v. Pilot Travel Ctrs., LLC*, 568 F.3d 641, 643-44 (8th Cir. 2009); *see also Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1936 (2008). She alleged that Mr. Cangemi retaliated against her because of her 1999 EEO age discrimination charge by refusing to give her annual evaluations, which would have given her an opportunity for additional compensation, and refusing to give her upgrades that would have increased her salary, and that these acts eventually caused her constructive discharge.

A federal employee generally must contact an EEO counselor "within 45 days of the date of the matter alleged to be discriminatory." 29 CFR § 1614.105(a)(1). Ms. Betz first contacted an EEO counselor about the alleged retaliation on November 5, 2003, and the district court granted summary judgment to DHS on claims based on retaliatory events that occurred more than 45 days earlier. Ms. Betz relies, however, on one of several exceptions to the deadline: Under § 1614.105(a)(2), the EEOC or the agency "shall extend the 45-day time limit" if the employee shows that "she was not notified of the time limits and was not otherwise aware of them." Ms. Betz asserted that despite knowing about the deadline for reporting discriminatory acts, she was unaware that she had to report acts of retaliation to an EEO counselor. The district court rejected her assertion: The court observed that Ms. Betz had brought at least one previous EEO charge and thus was well aware of the general requirement for filing a timely EEO charge. The court found that it was therefore likely that Ms. Betz knew that she should contact an EEO counselor if she believed that she was being retaliated against for having filed an EEO charge. We do not believe that the court clearly erred in finding that she was sufficiently familiar with the 45-day time requirement to be bound by it. We also note that Ms. Betz's conduct indicates that she did not distinguish between discrimination and retaliation when filing an EEO charge: In November, 2003, she first contacted an EEO counselor about her contention that she had suffered both discrimination and retaliation for the past three years.

Ms. Betz also argues that her claim of retaliation was not time-barred because it was based on a

continuing violation that did not end until after September 21, 2003. The Supreme Court has held that the continuing violation doctrine applies in hostile work environment claims, where, although one incident may not support a claim, the claim may be supported by a series of incidents that occur over a period of time, *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002), but Ms. Betz did not bring a hostile environment claim. Under the Court's holding in *Morgan*, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113. "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.' " *Id.* at 114. In her brief, Ms. Betz equates the denial of an upgrade with a failure to promote, and we conclude that the pre-September 21 matters that she contends prevented her from obtaining additional compensation are discrete acts that required her to contact an EEO counselor within 45 days of their occurrence. She did not do so and is therefore barred from bringing an action based specifically on those occurrences.

We note that Ms. Betz's EEO charge was timely as to her retaliation-based constructive discharge claim, which the court does not seem to have addressed separately, but we conclude that her working conditions were not intolerable as a matter of law. *See Tatom*, 228 F.3d at 932. Virtually all viable constructive discharge claims involve a hostile work environment, which Ms. Betz does not allege was present here. And even if we assume, without deciding, that she could show that Mr. Cangemi engaged in the

retaliatory acts that she alleges and that we can consider those acts in assessing her constructive discharge claim, we do not believe that she could make out a case. Although an employee would certainly not want to work for a supervisor who retaliated against her for a now-moot discrimination charge filed four years ago, we do not believe those circumstances would make the job intolerable. As we have said, DHS paid Ms. Betz about $39,000 annually, and she did not contend that the agency or Mr. Cangemi required her to perform duties or to work hours that were in any way inhumane or unacceptable. In fact, she asserted that others did similar work (but were paid more). Ms. Betz has not shown that the district court committed reversible error with respect to any of her retaliation claims.

III.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-3027

[Filed August 28, 2009]

Marlene Betz,	)
	)
Plaintiff - Appellant	)
	)
v.	)
	)
Michael Chertoff, Secretary, Department of Homeland Security,	)
	)
Defendant - Appellee	)
	)

Appeal from U.S. District Court for
the District of Minnesota - Minneapolis
(0:06-cv-00172-JMR)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 28, 2009

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

✎AO450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
District of Minnesota

Case Number: 06-cv-172-JMR-RLE

[Filed July 8, 2008]

Marlene Betz	)
	)
V.	)
	)
Michael Chertoff, Secretary, Department of Homeland Security	)
	)

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT: judgment shall be entered for defendant as a matter of law.

July 8, 2008
Date

RICHARD D. SLETTEN, CLERK

s/J. Dunbar Fannemel
(By) J. Dunbar Fannemel,
Deputy Clerk

Form Modified: 09/16/04

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

No. 06-CV-172(JMR/RLE)

[Filed July 7, 2008]

Marlene Betz	)
	)
v.	)
	)
Michael Chertoff, Secretary,	)
Department of Homeland Security	)
	)

ORDER

This matter was tried to the Court on June 30 and July 1, 2008. The Court entered its findings of fact and conclusions of law into the record on July 2, 2008. For the reasons stated on the record, IT IS ORDERED that judgment shall be entered for defendant as a matter of law.

Dated: July 7, 2008

s/ JAMES M. ROSENBAUM
JAMES M. ROSENBAUM
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No.: 0:06-cv-00172-JMR-RLE

[Filed October 24, 2008]

MARLENE BETZ,	)
	)
Plaintiff,	)
	)
vs.	)
	)
MICHAEL CHERTOFF, Secretary, Department of Homeland Security,	)
	)
Defendant.	)
	)

TRANSCRIPT
OF
PROCEEDINGS
(ORDER)

The above-entitled matter came on for hearing before Chief Judge James M. Rosenbaum, on July 2nd, 2008, at the United States District Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415, commencing at approximately 11:50 a.m.

CALIFORNIA CSR NO.: 8674

ILLINOIS CSR NO.: 084-004202

IOWA CSR NO.: 495

RMR NO.: 065111

[p.2] APPEARANCES

STEPHEN C. FIEBIGER & ASSOCIATES, Chartered, 2500 W. County Road 42, Suite 190, Burnsville, Minnesota 55337, by STEPHEN C. FIEBIGER, Attorney at Law, appeared as counsel on behalf of Plaintiff.

OFFICE OF THE UNITED STATES ATTORNEY, 300 South Fourth Street, Suite 600, Minneapolis, Minnesota 55415, by LONNIE F. BRYAN, Assistant United States Attorney, appeared as counsel on behalf of Defendant.

[p.3] THE CLERK: The matter on the calendar is Marlene Betz versus Michael Chertoff, Civil Number 06-172.

THE COURT: This matter comes before the court on plaintiff's claim of unlawful discrimination based upon her age, particularly in her compensation, and claims that she was actively and constructively discharged for that reason.

The record indicates, and the court finds, that the plaintiff retired from the Department of Homeland Security on November 28th, 2003. It is her contention that she was forced to depart from that position, as

I've indicated, basically due to wage discrimination and based upon her age. This court previously ruled during the motion for summary judgment that her claim would have been limited to discriminatory conduct occurring 45 days before her EEO complaint. That would have been on or after September 21, 2003. That was the court's consideration with regard to Ledbedder. That notwithstanding, the case was clearly tried and set forth the matters which she contended going long past and previous to that, going back as far as 1998 and 1999.

The court has considered all of the evidence admitted in its consideration of the case. The matter has been heard, both sides have rested, and now the court determines that the plaintiff has failed to prove her claim and will grant judgment as a matter of law in favor of the [p 4] defendant pursuant to Rule 50 of the Federal Rules of Civil Procedure.

By way of background, the court now finds that the plaintiff was an administrative assistant employed at the St. Paul office of the Federal Immigration and Naturalization Service, then "INS." In March 2003, that organization merged into the Department of Homeland Security, becoming known as the Bureau of Immigration and Customs Enforcement, "ICE." Throughout 2003, that agency went through significant changes, and the plaintiff became responsible for a number of additional tasks, which included providing administrative support to additional offices and personnel. It was the plaintiff's firm belief that she deserved additional compensation for her increased workload. One option she had previously exercised was to request a desk audit. If a desk audit were provided and found that the plaintiff

had been performing at a higher level, it might lead to an upgrade. That would be a reclassification at a higher grade on the General Schedule, the GS scale.

As of September 21, 2003, the plaintiff was compensated at GS 7-7. In her view, she was deserving of an upgrade to GS 11. Earlier in 2003, around March or April, she asked Mr. Cangemi, her supervisor and the agent in charge, for a desk audit or an upgrade. Mr. Cangemi told her he would see what he could do. No upgrade was forthcoming. [p.5] On September 21st, Mr. Cangemi, through his deputy, awarded the plaintiff three days of paid leave. She felt that that was an inadequate award for the higher level of work which she perceived herself to be doing.

On October 1st, the plaintiff told Mr. Cangemi that were she not able to receive be upgrade, she would be forced to retire. According to Mr. Cangemi -- it is uncontroverted -- that he claims he requested an upgrade, although no physical evidence in support of that were offered. It was Mr. Cangemi's statement that no such upgrades came through, and it is uncontroverted that no upgrades were given in that office during all of 2003. The plaintiff replied, when she found that there was nothing Mr. Cangemi could do, that she had no choice but her option to retire. She indicated to him that that was her wish and her desire on November 3, 2003, a date dictated by considerations related to the federal retirement account. Then other incidents took place about which the court will opine in a moment.

The plaintiff then went and spoke with Mary Hernandez, who had been supervising her work on a day-to-day basis, although unofficially, in the sense

that no formal transfer of supervision had been provided. But it appears to be uncontroverted that her work was most closely affiliated with Ms. Hernandez, partially because Mr. Cangemi, also [p.6] having absorbed larger responsibilities, traveled on a regular basis, as much as 50 percent of the time, leaving the administrative staff, all of which were encompassed by Ms. Betz, without an active supervisor on a day-to-day basis. Ms. Hernandez was troubled that the plaintiff's departure would cause difficulties in the office, since everyone did not know exactly what she was doing, and somehow they would need to accomplish the tasks that had been reserved to Ms. Betz. The plaintiff initially refused. At that point, Ms. Hernandez suggested, and offered, a 1,000-dollar special award, and this special award would be used, if you would, to upgrade her compensation for one month's period of time. She agreed to stay for 30 more days. During this 30 days, when she did continue to labor, she was provided compensation at the grade 7, step 7 level. The 1,000-dollar award was apparently passed through, but either never approved, but certainly never awarded.

Upon her departure, no one replaced her. Her work was divided among existing employees. None of those who assumed those responsibilities received either an upgrade or any additional compensation. No one disputes, no one suggested during the course of this trial, and the court makes no finding, that she was anything but a hard-working, conscientious, loyal employee who performed well in her position. However, the evidence reflects that there were no [p.7] desk audits, quality step increases or any upgrades which were placed in the St. Paul office at any point in 2003 or, indeed, for any time reasonably thereafter on

the record before this court. Rather, as testified by Nancy Weir, during this period the only way for an employee to get an increase in pay was to apply for a different job within the agency.

All of that is by way of findings and by way of background.

Under the Age Discrimination and Employment Act, the ADEA, it is, quote, unlawful for an employer...to discharge or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age, close quote. And that is from Tatom v. Georgia Pacific, 228 F3d, 926, 930, (8th Cir. 2000), which cited the statute of 29 United States Code, Section 623(a)(1).

An employee is constructively discharged when the employer deliberately renders her working conditions intolerable, and thus, forces her to quit her job. Once again from Tatom at 931, 932. The employer's actions must have been intended to force the employee to quit. The employee can establish intentional discrimination by showing that her resignation was a reasonably foreseeable consequence of the employer's discriminatory actions. Accordingly, [p.8] constructive discharge occurs only when a reasonable person would find that the working conditions were intolerable.

Reduced to its essence, then, the plaintiff's claim, and the plaintiff must bear the burden to show two elements, one that Mr. Cangemi made her working conditions so intolerable that a reasonable person would have quit; and two, that he did so because of her

age. The court finds that the plaintiff has failed to sustain this burden.

First, the plaintiff has failed to prove a constructive discharge.

She has not shown that a reasonable person would have found it intolerable to perform her work at the grade 7, step 7 level.

She had worked at this position for almost two years, having previously been upgraded in 2001.

The court considers it interesting, and important to recognize, that she was given an upgrade. She had been a GS 6 in 1997, at which time she was 59 years of age. In 1999, she was given an increase and she was upgraded from the GS 6 to the GS 7. She was 61 years of age. It is not obvious, and it certainly was not proven, why or how she was being discriminated against at age 63, when she hadn't been at 59 and 61. The court considers that to be significant.

Her request was to be increased to an 11. She [p.9] knew, and testified herself, that that was a very large increase and that she actually could not become an 11 for at least a year or two, would have to stop at an interim nine, apparently.

Further, while she may have claimed the conditions were intolerable, an additional offer of $1,000 made them tolerable enough to be sustained for one more month. The court notes that the salary matched her official job description. Part of that, of course, is she claims that her job description was wrong, but no one was getting new job descriptions at ICE in 2003. ICE,

the court must recognize, was in the process of being integrated into the Department of Homeland Security. Amidst the discussion during the trial, but the court recognizes, at least having learned over time, that the creation of the Department of Homeland Security involved the merger of many, many federal agencies and created the second largest federal agency behind only the Department of Defense. All of this was compressed due to exigent circumstances into a very short period of time, but those conditions did prevail while she was employed and during the 2003 period. No one in St. Paul was being paid at a GS 7 for similar or comparable work. It is also uncontroverted, as I said, neither upgrades nor quality-step increases nor any desk audits took place in 2003 or thereafter during the time that any evidence was offered in [p.10] this court.

Now I want to focus, if I can, on portions of the evidence which were presented. As I've indicated, the plaintiff received increases, including grade-level increases, at ages 59 and 61. There was no showing that any change occurred at all. Second, there was a gross failure to prove what the standards were that she had to meet to get an increase either to GS 9 or GS 11. There was no evidence provided, and the court has none showing, that anything that she did was outside of her grade GS 7-7 classification. Certainly they adopted a new accounting system, which had, and carried, additional responsibilities, but the Government had simply changed a system. There was no showing that anybody who was a 7 was either incompetent to handle or, indeed, did not handle. The suggestion was all the people who used this program had to be higher, but there was no evidence in support of that offered whatsoever. The court does not have,

and has not been proffered, any objective standard to show what she did that mandated either a GS 9 or what she did that mandated an 11. The court recognized that she gave to it an extended list of her duties. I think it was in Exhibit 105. Nancy Weir sent a questionnaire and the duties which she performed. I can run down the list, but the large increases that she picked up, after they picked up Nebraska, she got the federal financial management system, [p.11] and she did some things with purchase of vehicle repairs and office supplies. But at no point did she ever have supervisory authority over anyone. The plaintiff never had a single report -- that means no person who reported to her -- she wasn't responsible for another employee's work or their production. The work that she did before, and the work that she did after, the merger was clerical. She did maintain electronic databases, but an electronic database is nothing more or less than a file organized by a computer. She did some additional things on time and attendance, and prepared certain reports but, according to her description, the reports were extracted from documents which were submitted by the criminal agents and merely organized that information. That does not strike the court as anything but, and there's no evidence that it was anything but, clerical work.

It is significant to the court, and the court finds it highly probative, that after her departure, nobody filled the position she had occupied. All of her duties were encompassed and absorbed by the fellow employees on the site. More than that, no one who assumed any of her responsibilities either got a grade increase or a bonus as a result of it, apparently. As I indicated before, it is uncontroverted that no one got a

desk audit nor was there a grade increase in 2003 entirely at all in St. Paul.

Then there were a number of incidents to which [p.12] the court was directed. In 2001, approximately two years before the matters of immediate concern, Mr. Cangemi had a conversation with the plaintiff. The court's notes reflect, and I believe this accurately reflects the plaintiff's testimony, was she ever asked by Mr. Cangemi about her retirement plans. She replied that, in July, 2001, she said that she was going to see if there is a buyout. That is all. There was no discussion about her production, there was no discussion about "You really ought to think about this." There was no suggestion that she was becoming, or was, less competent. There was no suggestion of anything other than an inquiry. While sex, on one set of cases, or age in another, cannot be permitted to be the determining factor. In this case, there is no indication that this was a determining factor of anything. In the world, people ask each other what their plans are for the future. This happened to be medium conjunct, as the court recalls, of a conversation about another person who actually was retiring at the time. It is not unusual for people who are working to ask each other whether or not they're going to continue in their employment. And such a simple inquiry is not an indication, absent more, of discrimination based on age. And the court of appeals has strongly suggested that there ought to be some nexus between such an inquiry and an immediate action being taken. There was none in this case. It was fully two years thereafter [p.13] before there was any other suggestion at all about her departure, and that was initiated by the plaintiff, who said, "If I don't get a raise, I have to leave." There was no showing

whatsoever that this conversation indicated anything other than a casual inquiry, in a workplace, asking whether someone was going to continue.

The second, styled "The Breakroom Incident," the court's notes reflect, and I believe that the record will follow, that she went into speak to Mr. Cangemi on October 29, 2003. She asked for an upgrade. He said no. There's nothing he can do. She was very unhappy. Later that afternoon, she went to the breakroom; that was one of her regular practices. Mr. Cangemi came to the breakroom at approximately 3:30 p.m. She was cleaning the coffee pot; that was one of her regular responsibilities. Mr. Cangemi entered. He said that if she was disturbed, she could go home and could come back the next day to put in her paperwork. He claims he was as much as six feet away from her. She claims he came within three feet. That was all that happened. No hands were raised, there was no indication that a voice was raised. She did not testify that he yelled at her. She said she felt threatened, she was upset. She continued her cleaning, and departed. This court must consider whether or not that was a threat or intimidation. This was the only such incident that occurred between them, [p.14] if indeed it rises to the level of an incident at all. The court does not doubt that she, feeling unhappy in her employment, subjectively felt uncomfortable and displeased that Mr. Cangemi came in and that he spoke with her. But even the words that she said that he said, the actions that she described, do not make out an objective threat or an effort to intimidate. Nothing changed. She had told him that she wanted to quit. She had told him she felt she could not continue. And that was the entire incident. It does not strike the court, and the court

does not find, that it was intimidation, nor does the court find that it was based upon her age.

The next matter of concern, her desk was moved. First of all, if there ever was an insignificant factor, this one strikes the court as being insignificant. Clearly, things had deteriorated thereafter -- and now I'm talking about right after the first of November. This is right after she indicates she wishes to leave, and she will stay -- I'll speak a little more about the thousand dollars and her relationship with Ms. Hernandez -- but she's now moved closer to the person with whom she is working. There's no evidence at all that this is a less desirable or less prestigious location. There's no indication that she lost air circulation or access to windows, or anything like that. All that happened is she was moved. Frankly, the two of them, [p.15] quite obviously, were not getting along very well -- and the two are Mr. Cangemi and the plaintiff -- and the fact that she was working closer to the person with whom she was regularly working strikes the court as not at all any form of discrimination and certainly not discrimination based on age.

Now I focus on the $1,000. The $1,000 was a suggestion by the then inline supervisor Ms. Hernandez, and she proposed to provide additional compensation for 30 days, which would offer an incentive to the plaintiff to remain on site and assist in training others or showing them what she was doing. First of all, in this court's view, that money had been promised. She continued to work and she should have been given it. That having been said, that is a moral and personal observation. And I will explain why I do not believe, unfortunately, that I can order anything about it. It did not occur. But there's no suggestion

whatsoever, none in the record, that the reason she didn't get it was because of her age. Now, she continued to work under what appeared to be a promise for an additional thousand dollars. And the reality is she was not working for a regular employer, she was working for the United States of America. And this is what was known, at least in this court's view, as a claim in "quantum meruit," which the lawyers will know, but I will tell you means that if you perform services for people who wish them performed, you can imply a contract, and you can [p.16] require payments under the contract. The problem is that you cannot run quantum meruit against the United States. It doesn't do that. The United States is not susceptible to such a claim, being the sovereign. In my view, she was promised it, she performed the services, and she ought to have been properly given it. But my views are not the law. I'm bound to apply the law.

The plaintiff has proffered two comparables, two other people who she feels were not discriminated against on the basis of age and who received compensation at the GS 11 level. First, one Mr. Oswald. Oswald was apparently 53 years old. This is, of course, not a gender case, no allegation along that line, and, therefore, I set that aside. The court finds Mr. Oswald was not comparable. He was in another office. He was in Omaha. He did not go to, or through, Mr. Cangemi; but more than that, his raise and increase did not go through Mr. Cangemi either. There is absolutely no evidence of what Mr. Cangemi would have done with his compensation respecting the fact that he was 53 or any other age, but that does not show what would have happened to him. Secondly, the issue in the case is not whether a younger person had received an 11, the question in the case is whether or

not the denial of the 11 or, indeed, the nine, as a step toward the 11 to the plaintiff, reflected Mr. Cangemi's age bias. And Mr. Oswald does not reflect [p.17] that. He came out of a different office. The court has no real evidence as to either his responsibilities or what he did that got him from a 7 to the 11. There was a suggestion at one point that the plaintiff heard Mr. Oswald say, "Well, I'm doing what you are, and I'm making an 11 and so should you." First of all, setting aside whether or not that is rank hearsay, he is not the person who awards increases. The increases, theoretically, are awarded through the office. His opinions as to whether or not her work justified an 11 are simply incompetent to offer information on that subject. And finally, and extremely importantly, it is uncontroverted that his increase was set in place prior to 2003. It may have come through at that time, but there was no increases given, as I've indicated, in the St. Paul office. This came through Omaha by way of Dallas, I believe, I think Texas, and there's no indication whatsoever that either Mr. Cangemi or anyone in St. Paul had anything to do with it.

And then we have Sylvia Seamans. This court has scoured the record. I'm not clear at all on what her age is. I will assume for the purposes of this decision that she was younger than the plaintiff. I do not know how much younger. But once again, there is no showing of the background, how she got her increase from either whatever lower level she was at, up until the 11 that she apparently had. I do not find that there is any indication that [p.18] Mr. Cangemi awarded the 11 to Ms. Seamans based on her youth as opposed to denying it to Ms. Betz based upon her age. I believe that the record indicated, however, respecting Sylvia Seamans, that she had been already an 11 when Mr.

Cangemi began supervising her. There's simply no showing one way or the other what role he took in her decision-making.

That basically reflects the court's review of the evidence in the matter. And, so, I have to take a look a at what the plaintiff was required to prove. First of all, I cannot find that anything based upon the plaintiff's age made her feel compelled to depart the employment based on her compensation. She may have felt that she was entitled to more money, but that feeling from people who are good and productive workers is not unusual. But I do not find that the conditions were objectively intolerable such that no reasonable person could have continued to work for the 37 or $39,000 per year that she was making in what remained a clerical job. Second, she has failed to establish that she was intentionally discriminated based upon her age and that her retirement would be reasonably foreseeable considering the discrimination with which she was confronted.

Accordingly, I find that she has failed to sustain her burden of proof. Judgment will be granted in favor of the defense. And that will be the order of the court. I thank you.

[p.19] MR. BRYAN: Thank you, your Honor.

(Court stood in recess at approximately 12:15 p.m., on July 2nd, 2008).

[p.20]

STATE OF MINNESOTA)

) ss.

COUNTY OF HENNEPIN)

I, Ronald J. Moen, CSR, RMR, and a Notary Public in and for the County of Hennepin, in the State of Minnesota, do hereby certify:

That the said proceeding was taken before me as a CSR, RMR, and a Notary Public at the said time and place and was taken down in shorthand writing by me;

That said proceeding was thereafter under my direction transcribed into computer-assisted transcription, and that the foregoing transcript constitutes a full, true and correct report of the transcript of proceedings which then and there took place;

That I am a disinterested third person to the said action;

That the cost of the original has been charged to the party who ordered the transcript of proceedings, and that all parties who ordered copies have been charged at the same rate for such copies.

That I reported pages 1 through 20.

IN WITNESS THEREOF, I have hereto subscribed my hand this 27th day of July, 2008.

s/ Ronald J. Moen
RONALD J. MOEN,
CSR, RMR

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

No. 06-CV-172(JMR/FLN)

[Filed June 4, 2007]

Marlene Betz	)
	)
v.	)
	)
Michael Chertoff	)
	)

ORDER

This matter is before the Court on defendant's motion for summary judgment. The Court heard oral argument on May 31, 2007. Based on the arguments of counsel, and the files, records, and proceedings herein, and for the reasons stated at the hearing, defendant's motion is granted in part and denied in part.

1. Plaintiff's claims based on allegedly discriminatory or retaliatory events that occurred prior to September 21, 2003 are untimely, and summary judgment for defendant is granted as to these claims.

2. In all other respects defendant's motion is denied.

IT IS SO ORDERED.

Dated: June 1, 2007

s/ JAMES M. ROSENBAUM
JAMES M. ROSENBAUM
United States Chief District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

No. 06cv172 (JMR/RLE)

Marlene Betz,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Michael Chertoff, Secretary, Department of Homeland Security,	)
	)
Defendant.	)

Minneapolis, MN
May 31, 2007
10:40 a.m.

BEFORE THE HONORABLE
JAMES M. ROSENBAUM
UNITED STATES DISTRICT COURT JUDGE
(SUMMARY JUDGMENT MOTION)

APPEARANCES:

For the Plaintiff: Stephen Fiebiger & Associates
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For Defendants: U.S. Attorney's Office
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Court Reporter: Lorilee K. Fink, RPR CRR
1005 U.S. Courthouse
300 S. Fourth Street
Minneapolis, MN 55415

Proceedings recorded by mechanical stenography; transcript produced by computer.

* * *

[p.22] * * *

THE COURT: This matter comes before the Court on the motion of the defendant seeking summary judgment. For the following reasons, the defendant's motion is granted in part and denied in part.

It appears that the plaintiff worked as an administrative assistant in the United States Immigration and Naturalization Service which then became the Immigration and Customs Enforcement Division of the Department of Homeland Security.

[p.23] It is her claim that she was paid less than similarly-situated younger employees n violation of the Age Discrimination and Employment Act, and that this wage discrimination created an intolerable environment which caused her to leave her job. She made contact with an EEO counselor in November of 2003 -- actually, on November 5 of that year, and officially retired on November 28, 2003.

Summary judgment, of course, is appropriate when the evidence viewed in the light most favorable to the non-moving party presents no genuine issue of material fact. I cite Federal Rules of Civil Procedure 56; and Celotex v. Catrett and Anderson v. Liberty Lobby, companion cases decided in 1986, one at 477 U. S. 317, the other at 242.

With respect to all of the claims arising from events prior to September 21, 2003, the Court grants summary judgment for defendant because these claims are time-barred.

A federal employee who wishes to bring an employment discrimination claim against the United States is required to contact an EEO counselor, quote, within 45 days of the date of the matter alleged to be discriminatory, close quote. That is from 29 C.F.R, Section 1614.105(a)(1). There are occasions when this [p.24] deadline may be extended if certain regulatory conditions are met. I reference again, 29 C.F.R., 1614.105, here at (a)(2).

Also, it can be waived through waiver, estoppel, equitable estoppel, and equitable tolling. I cite Zipes v. Trans World Airlines at 455 U. S. 385, at 393, 1982.

And Coons v. Mineta at 410, F.3d, 1036, at 1040; 8th Circuit, 2005.

The plaintiff suggests that the United States waived its limitations defense by failing to plead it as an alternative defense. The Court does not agree. The limitations issue is part of the larger issue of whether the plaintiff properly exhausted her administrative remedies. I reference here Coons at 1040, and Nygren v. Ashcroft at 109 Fed. Appendix 816, at 819 from the 8th Circuit in 2004.

The plaintiff herself raised the issue in her own complaint. I reference paragraph 3 thereof, and it has been raised repeatedly by the United States during discovery. There has been no waiver by the United States, and in any case, there was neither prejudice nor unfair surprise.

Now the plaintiff suggests that the 45-day limitation relies -- is only available in discrimination as opposed to retaliation claims, both [p.25] in oral argument and in her memo at 39. There -- I believe the Court is of a mind that she is incorrect. They are definitely distinct legal theories. There is no hint in the ADEA or Title 7, however, that Congress relieved federal employees of their obligation to exhaust administrative remedies simply because they pled a retaliation claim. In this regard, plaintiffs reliance on Burlington Northern and Santa Fe Railway v. White is misplaced. That case did not address any issues related to exhaustion or administrative remedies or timeliness. I reference the Supreme Court case at 2405 in 2006.

She knew that this was an affect that was after her employment, the terms and conditions, the way she was treated according to her contentions, and the way she's being dealt with. She knew that under those circumstances she needed to go to an EEO person and there was one there; she had gone on more than one occasion. The fact that she did not receive particularized training is not, in this Court's view, sufficient to remove the exhaustion requirement which has been imposed in such cases.

She claims that she was not aware of any 45-day notice requirement, again, at paragraph 39. But that does not toll the limitations period. [p.26] Equitable tolling, quote, is reserved for circumstances that are truly beyond the control of the plaintiff. I reference Coons at 410 F.3d at 1040, and is precluded where an employee has, quote, general knowledge, close quote, of the right not to be discriminated against or can obtain such knowledge. And here I cite Briley v. Carlin at 172 F.3d, 567, at 570; 8th Circuit, 1999.

Here, the record reflects not only that the plaintiff had previously filed an EEO complaint in 1999, but also reflects and makes clear that by 2000, she knew she had been retaliated and could file and EEO complaint. I refer to her deposition at 101 through 103.

The plaintiff is not entitled, therefore, to equitable tolling of the limitation period in her retaliation claims. Therefore, to the extent that the alleged wage discrimination and constructive discharge maybe considered retaliation, plaintiff's conduct prior to September 21, 2003, this Court considers the claims to be time-barred.

To the extent that she argues that there is a continuing violation, the Court is guided by the recent decision from the United States Supreme Court in Ledbetter v. Goodyear Tire. That's at 2007 West [p.27] Law, 1528298 at *12, May 29, 2007. In that case, the plaintiff also claimed she received lower pay for discriminatory reasons.

Now, the upshot of it is, people know when they don't get paid if they're at work, and they know they didn't get paid. And the Supreme Court concluded that claims based on all pay decisions made outside the limitations period are time-barred, and further concluded, that plaintiff's claim included a series of discrete acts instead of a continuing violation, which means every time you don't get paid, you know you didn't get paid. And here I reference at *11-12.

Here, plaintiff, as I said, consulted with an EEO counselor in November 5, 2003. She was obligated by federal regulations to do so within 45 days of the alleged discriminatory act. It means she may not sit on her rights. And therefore, she may not present any evidence of discriminatory or retaliatory acts prior to the 45-day period before that, which means prior to September 21, 2003, as claims based on evidence -- such evidence are time-barred.

Therefore, in conclusion, the Court finds that summary judgment is appropriate and is mandated to all claims prior to that date. In all other respects, the defendant's motions are denied, and I [p.28] will tell you that there was not a directed motion for a summary judgment on the $1,000, but somebody better think about that one in a big hurry.

That will be the Court's ruling. Counsel, you ought to square this case away. We're in recess.

MR. BRYAN: Thank you, Your Honor.

* * *

CERTIFICATE

I, Lorilee K. Fink, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: _____
Dated: Lorilee K. Fink, RPR-CRR

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 08-3027

[Filed November 4, 2009]

Marlene Betz,	)
	)
Appellant,	)
	)
v.	)
	)
Michael Chertoff, Secretary, Department of Homeland Security,	)
	)
Appellee.	)
	)

Appeal from U.S. District Court
for the District of Minnesota - Minneapolis
(0:06-cv-00172-JMR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 04, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans